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A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 09-31932 TEC
)	
ARDEN VAN UPP, aka DEE RICH,)	Chapter 11
aka DEE ELMALIK,)	
)	
)	
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)	
Debtor.)	

**MEMORANDUM RE ATTORNEYS FEES CLAIMED BY SECURED CREDITORS
4 QUARTERS INVESTMENT COMPANY AND MARGARET POCOROBA**

Secured creditor 4 Quarters Investment Company filed an application to have the attorneys fees it incurred in this bankruptcy case allowed as part of its secured claim pursuant to 11 U.S.C. § 506(b). Secured creditor Margaret Pocoroba filed a similar application. Debtor objected to both applications on the basis that the fee provision in each creditor's note and deed of trust did not cover the activities in question, and on the basis that the fees sought were not reasonable. Upon due consideration, and for the reasons set forth below, I determine that the fees

1 should be allowed as requested, except as to \$360 in fees sought by
2 4 Quarters.

3 A. Scope of Fee Clause

4 It is undisputed that attorney fees may be allowed as part of
5 a secured claim under section 506(b) only if the promissory note or
6 security agreement provides for the secured creditor to recover
7 fees for the work in question. In re Dalessio, 74 B.R. 721, 723
8 (9th Cir. BAP 1987).

9 The deed of trust securing 4 Quarters' claim and the deed of
10 trust securing Pocoroba's claim contain the same fee clause, which
11 requires Debtor to pay secured creditor for fees reasonably
12 incurred in any "proceeding purporting to affect the security" for
13 the loan.

14 A bankruptcy case is a proceeding that very directly affects
15 the security for the loan, because the filing of a bankruptcy
16 petition stays the secured creditor from enforcing its rights
17 against the collateral under non-bankruptcy law. See 11 U.S.C.
18 § 362(a). The Ninth Circuit Bankruptcy Appellate Panel has
19 described contractual language substantially identical to that in
20 question here as "a broad attorney's fees provision," which covers
21 fees incurred by the secured creditor in filing a motion for relief
22 from stay or an objection to a confirmation of a plan of
23 reorganization, where such action is necessary to protect the
24 creditor's interest in the collateral securing the loan.
25 Pasatiempo Properties v. Le Marquis Associates (In re Le Marquis
26 Associates), 81 B.R. 576, 579 (9th Cir. BAP 1987); accord In re
27 Dix, 140 B.R. 997, 999-1000 (Bankr. S.D. Cal. 1992).

1 Even under the broad fee provision involved here, however,
2 attorney fees incurred by a secured creditor do not become part of
3 the secured claim unless they are reasonable in amount and were
4 incurred for services reasonably necessary to protect the secured
5 creditor's interest in the collateral. Marquis, 81 B.R. at 578;
6 Dix, 140 B.R. at 999.

7 B. Reasonableness of Creditors' Actions

8 4 Quarters holds a promissory note secured by a first deed of
9 trust against a single-family residence at 2550 Webster Street, San
10 Francisco. The outstanding loan balance on the note is
11 approximately \$1.3 million. 4 Quarters also holds a \$695,000 note
12 secured by a first deed of trust against a nine-unit apartment
13 building at 1019 Ashbury Street, San Francisco, and a \$763,000 note
14 secured by a first deed of trust against a nine-unit apartment
15 building at 2807-09 Steiner Street, San Francisco. Pocoroba holds
16 a second-priority deed of trust on these same three properties,
17 which secures an outstanding loan balance of approximately
18 \$424,000.

19 Both 4 Quarters and Pocoroba had good reason to be very active
20 in the present bankruptcy case.

21 First, Debtor's failure to maintain the Webster Street
22 property both pre- and post-petition posed a serious threat to the
23 value of the collateral. Photographs submitted to the court show
24 the property to be full of refuse, crumbling wallpaper and plaster,
25 and parts of the roof and exterior walls in such a state of
26 disrepair that parts of the building are open to the elements.

27 Second, Debtor refused to take a realistic view toward
28 reorganization of her debts. Despite the fact that she had

1 insufficient income to pay the present debt service on the Webster
2 Street property, and despite the horrible state of disrepair into
3 which she had allowed that property to fall, she stated at the
4 first chapter 11 status conference that she intended to refinance
5 that property. After reviewing the circumstances of the case, the
6 court advised Debtor that she would be allowed a reasonable time to
7 sell the property, but that the court would grant relief from stay
8 to the secured creditors if she did not move her case along
9 diligently. Debtor's counsel then filed a motion to establish
10 procedures for selling the Webster Street property. At the hearing
11 on that motion, Debtor withdrew the motion and fired her counsel.

12 Third, after the court appointed a chapter 11 trustee, Debtor
13 interfered with the efforts of that Trustee to sell the Webster
14 Street property, and to collect rents from the Ashbury Street and
15 Steiner Street properties. Declarations filed by Trustee and his
16 counsel indicate that Debtor: (1) refused to turn over legible or
17 complete rent rolls to the Trustee; (2) refused to turn over keys
18 to the Steiner Street gate and front door, forcing the Trustee to
19 engage a locksmith replace the locks; (3) deposited rents into her
20 daughter's checking account, returned those rents to Trustee only
21 upon threat of a turnover motion, and never provided an accounting
22 of the rents in question; (4) ordered workman who were trying to
23 repair Webster Street's severely dilapidated roof and back wall to
24 leave the premises; (5) authorized a man (Petrizze) to live on the
25 Webster property without a lease and defended him at eviction
26 proceedings after having told the Trustee that Petrizze had no
27 authority to live on the property; (6) failed to collect half of
28

1 the scheduled \$36,000 in rents for September and October 2009¹; AND
2 (7) after the Trustee's appointment, directed a tenant to pay rent
3 to Debtor via an alias. When Trustee filed a motion to approve
4 procedures for the sale of the Webster Street property, Debtor
5 brought a motion to dismiss the chapter 11 case, which the court
6 denied.

7 In short, even though the claims of 4 Quarters and Pocoroba
8 likely were fully secured, those creditors had reason to believe
9 that the value of their collateral might substantially decline and
10 payment of their claims be unreasonably delayed, if they did not
11 actively push Debtor, Trustee, and the court to have the Webster
12 Street property sold promptly, if possible before the full
13 onslaught of the Northern California rainy season.

14 I determine that counsel for 4 Quarters acted reasonably in
15 furtherance of the preservation of 4 Quarters' collateral in taking
16 each of the actions performed in this bankruptcy case: filing a
17 motion for relief from stay; participating at all court hearings
18 regarding 4 Quarters' collateral; supporting the appointment of a
19 chapter 11 trustee; cooperating actively with Pocoroba and the
20 Trustee to further the prompt sale of the Webster Street property;
21 opposing Debtor's multiple motions to dismiss the case; closely
22 monitoring Debtor's use of cash collateral; filing responses to
23 Debtor's objection to 4 Quarter's claim and Debtor's motion to sell
24 the Webster Street property free and clear of (part of) 4 Quarters
25

26 ¹ In addition to these acts, after Trustee's
27 appointment and without any authorization by Trustee or
28 this court, Debtor withdrew \$40,000 cash from estate bank
accounts.

1 lien; reviewing and analyzing Debtor's prior bankruptcy case;
2 prosecuting a Rule 2004 examination of Debtor; analyzing documents
3 produced by Debtor in connection with the 2004 examination and
4 following up on documents not produced; analyzing all pleadings and
5 operating reports filed in Debtor's bankruptcy case; analyzing
6 Debtor's tax returns; and preparing a payoff demand.

7 I determine that Pocoroba's counsel acted reasonably in
8 furtherance of the preservation of Pocoroba's collateral in taking
9 each of the actions he performed in this bankruptcy case:
10 monitoring closely 4 Quarters' motion for relief from stay, filing
11 a motion for relief from stay, participating at all court hearings
12 concerning Pocoroba's collateral, supporting the appointment of a
13 chapter 11 trustee, cooperating actively with 4 Quarters and the
14 Trustee to further the prompt sale of the Webster Street property,
15 and opposing Debtor's multiple motions to dismiss the case. It is
16 worthy of note that Pocoroba's lien on each of the three properties
17 was junior to the lien of 4 Quarters, and therefore Pocoroba had to
18 watch carefully all actions taken by 4 Quarters, lest 4 Quarters
19 obtain relief from stay and leave Pocoroba a sold-out junior
20 lienholder. I also note that Pocoroba had as much reason as
21 4 Quarters to fear that dismissal of the chapter 11 case might very
22 well slow the repayment of her claim.

23 C. Reasonableness of Amount of Fees Sought

24 Debtor's counsel first objects to the amount of fees sought by
25 4 Quarters and Pocoroba on the basis that neither creditor filed an
26 application that conforms to the court's guidelines for fee
27 applications. This argument is unpersuasive, because those
28 guidelines do not apply to fees sought by secured creditors under

1 section 506(b). The guidelines apply only to applications for fees
2 by chapter 7 and chapter 11 trustees, and counsel and other
3 professionals representing the bankruptcy estate. This court will
4 sometimes in its discretion direct counsel for a secured creditor
5 seeking fees under section 506(b) to use the fee application format
6 specified in the guidelines, but the court did not do so in the
7 present case.

8 After careful review of the time records submitted by
9 4 Quarter's counsel, consideration of the extent and nature of the
10 proceedings in the case, the amount of 4 Quarter's claim, I find
11 that 4 Quarter's counsel performed their services with reasonable
12 efficiency, and that the amount sought is reasonable in light of
13 the services performed and is in proportion to the amount at stake,
14 except with respect to two very small, vague time entries totaling
15 \$360.² Thus, 4 Quarters is entitled to recover attorneys fees and
16 expenses of \$177,268.61 through December 29, 2009 as part of its
17 secured claim.

18 After careful review of the time records submitted by
19 Pocoroba's counsel, consideration of the extent and nature of the
20 proceedings in this case, the amount of Pocoroba's claim, and the
21 fact that counsel for 4 Quarters took the lead oar on most issues
22 involving the real property collateral, I find that Pocoroba's
23 counsel performed his services with reasonable efficiency, and that

24
25 ² The court finds that the following two time entries are
26 too vague to determine the reasonableness of the related
27 fees: (1) entry by Ms. Kaelin dated July 23, 2009 for half an
28 hour re status follow-up, list of outstanding information,
"review update," and review e-mail to counsel; and (2) entry
by Mr. Chen dated July 29, 2009 for half an hour re
investigation of creditor matrix.

1 the amount sought is reasonable in light of the services performed
2 and is in proportion to the amount at stake. Thus, Margaret
3 Pocoroba is entitled to recover \$32,472.50 for attorneys fees and
4 expenses through December 22, 2009 as part of her secured claim.

5 ****END OF MEMORANDUM****

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